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SUPREME COURT, U. S.

No. 70-58

In the Supreme Court of the United States

OCTOBER TERM, 1971

OLIVER T. FEIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL BOARD NO. 7, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (A. 90-96) is unreported. The opinions of the court of appeals (A. 97-120) are reported at 430 F. 2d 376.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1970. On October 16, 1970, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including December 19, 1970. The petition was filed on that date; it was granted on March 8, 1971 (401 U.S. 953). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 10(b)(3) of the Military Selective Service Act of 1967 bars preinduction judicial review of petitioner's challenge under the Due Process Clause of the Fifth Amendment to Selective Service appeal procedures.

2. Whether, at all events, petitioner should be required to demonstrate that the monetary amount in controversy satisfies the $10,000 jurisdictional requirement of 28 U.S.C. 1331.

STATUTES INVOLVED

Section 1331(a) of Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. V) 460(b)(3), provides in relevant part as follows:

> The President is authorized—
>
> * * * * * *
>
> to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction and maintenance of records of persons registered under this title [sections 451, 453, 454, 455,

456, and 458–471 of this Appendix], together with such other duties as may be assigned under this title [said sections]: * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * * The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title [section 462 of this Appendix], after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be op-

posed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President, only when there is no basis in fact for the classification assigned to such registrant. * * *

STATEMENT

Petitioner, a doctor of medicine, commenced this civil suit in the United States District Court for the Southern District of New York on February 7, 1969, seeking to enjoin his induction into the armed forces essentially on the ground that the Selective Service appeal procedures, which resulted in his I–A classification, violated due process of law. The district court (A. 90–96) dismissed the suit for lack of jurisdiction under Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460 (b)(3). A divided court of appeals affirmed (A. 97–120).

Petitioner registered with his local board in Yonkers, New York at the age of eighteen and, on March 10, 1959, was assigned a student (II–S) deferment as an undergraduate at Swarthmore College, Swarthmore, Pennsylvania (C.A. App. 101a).[1] Except for a brief period not here relevant, he retained that classification until July 19, 1967, when, following his graduation from Western Reserve University School of Medicine, he received an occupational (II–A) deferment for his internship (C.A. App. 102a).

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[1] "C.A. App" references are to the printed appendix in the court of appeals, a copy of which is on file with the Clerk of this Court; "A" references are to the Appendix filed by the parties in this Court.

On September 12, 1967, while still classified II–A, petitioner wrote his local board (A. 27) claiming that he was "a conscientious objector to war and the institution which propagates war, the military." He requested and was mailed SSS Form 150 (Special Form for Conscientious Objectors), which he completed and returned to his local board on September 20, 1967. In an attached statement (A. 37–46), he explained that his beliefs derived from three ideals: that "human beings are primarily 'good' ", that "the expression of this 'goodness' can only be realized if human beings are allowed to fulfill their potential," and that "all human beings are fundamentally equal, in terms of their value as human beings" (A. 37). "War," he said, "violates this essential being in all men * * * it fosters irresponsibility for inhuman and cruel acts. [It] demands a style of life, which is violent and hierarchical. It curbs and extinguishes rather than expands man's potential" (*ibid.*). These beliefs, he added, "are not merely a personal moral code, but are ideals which emanate from centuries of religious tradition" (A. 38).

In response to the question when, if ever, he would use force, petitioner stated that "I believe in the power and values of moral and ethical force, while I reject violent force," except when used in "self defense" or in defense "of a loved one" (A. 41). While he acknowledged that the early teachings of his parents and the Lutheran Church undoubtedly had some influence on the shaping of his convictions (A. 38, 39, 42), he also indicated (A. 42–43) that his conscientious objection to war did not begin to develop until

his college years. He was then directly exposed for the first time to the injustices of segregation in the South, to living conditions in the slums of San Francisco, and to the problems in a "Negro ghetto" in Cleveland, Ohio (A. 42–44). These experiences, he said, resolved him to "a full commitment to non-violence" (A. 44). This view allegedly crystallized into petitioner's present opposition to war after he had participated in a community project in Cleveland sponsored by Students for a Democratic Society, which, he claimed (A. 44), provided him with the opportunity to "fulfill my new non-violent commitment and provide a framework for working out my ideals about justice and equality."

After receiving the conscientious objector claim, and the supporting letters (A. 47–52), petitioner's local board invited petitioner to appear personally on November 15, 1967, to discuss his beliefs; written summaries of that appearance were prepared by petitioner (A. 53–54) and by the local board (A. 57–58), and were placed in petitioner's Selective Service file. Following the meeting, petitioner was denied a I–O classification "at this time" (*ibid.*) and was retained in the "lower" Class II–A.[2]

On February 14, 1968, petitioner was reclassified I–A (C.A. App. 102a); the next day he was mailed a Notice of Classification (Form 110) and a letter advising him of his right to take an administrative appeal or request a personal appearance before his

[2] Selective Service regulation 32 C.F.R. 1623.2 provides that each "registrant shall be classified in the lowest class for which he is determined to be eligible."

local board. Petitioner requested and was granted a personal appearance on May 27, 1968. Prior to that date, he submitted to his local board a lengthy statement responding to specific questions raised by board members during his earlier appearance (C.A. App. 66a–68a; see Appendix A, at pp. 63–66, *infra*). In addition, counsel wrote a letter on petitioner's behalf on May 21, 1968; in it the attorney set forth his legal opinion that petitioner's beliefs had sufficient religious content to qualify for conscientious objector status (C.A. App. 67a; see Appendix B, at pp. 67–71, *infra*). Both the statement and the letter were placed in petitioner's Selective Service file.

Following the May 27 interview, the local board reclassified petitioner I–O (A. 59–60). On June 4, 1968, the State Director of Selective Service requested an appeal to the State Appeal Board,[3] stating simply that, "It is our opinion that the registrant would not qualify for a I–O classification as a conscientious objector" (A. 63). The following day, notice of the appeal was mailed to petitioner (A. 65a). By letter of June 10, 1968 (A. 66), petitioner requested "a statement indicating the basis for the State Director's appeal" and "an opportunity to reply to such a statement." The State Director, however, offered no explanation for his action either to petitioner or to the State Appeal Board (A. 63).

[3] Selective Service regulation 32 C.F.R. 1626.1 provides: "Either the Director of Selective Service or the State Director of Selective Service as to local boards in his State may appeal from any determination of a local board at any time."

On June 20, 1968, petitioner's Selective Service file was considered *de novo* by the State Appeal Board. The file contained all the information that had been before the local board (A. 65a); it did not, however, include letters received subsequent to the State Director's appeal (C.A. App. 74a, 76a–77a, 79a), written by three individuals who had earlier submitted references that were in the file (A. 48, 49–50, 51–52) and who wished to reaffirm their belief in petitioner's sincerity. Accompanying the file was a "brief", or synopsis, prepared by an assistant appeal board clerk, summarizing the information in the Selective Service file (A. 89h, 89i). The appeal board, without stating any reasons, voted unanimously (4–0) to deny petitioner's claim to conscientious objector status and reinstate him in Class I–A (A. 67).

Since a registrant is precluded by regulation, 32 C.F.R. 1627.3, from taking an administrative appeal of a unanimous classification by the State Appeal Board, petitioner wrote to the National Director of Selective Service on July 13, 1968 (A. 69) requesting that the National Director, pursuant to 32 C.F.R. 1627.1, take an appeal on his behalf to the National Appeal Board (A. 71–72). The letter set forth in some detail the nature of petitioner's conscientious objection and summarized the prior administrative proceedings; it also enumerated five alleged "injustices" that purportedly occurred during the processing of his claim (A. 71). On September 16, 1968, the National Director entered a notice of appeal (A. 78, 79); petitioner's outstanding order to report

for induction was cancelled (A. 81).[4] The National Appeal Board voted unanimously (3–0) to classify petitioner I–A on November 26, 1968 (A. 85–86). It gave no reasons for its action.

Petitioner then filed the present suit,[5] asking that the court declare invalid the appeal procedures followed here by the State Director and the State Appeal Board as violative of procedural due process under the Fifth Amendment. He sought an order enjoining his induction and restoring him to conscientious objector status (A. 3). As earlier indicated, the district court (A. 90–96), relying on the decisions by this Court in *Clark* v. *Gabriel*, 393 U.S. 256, and *Boyd* v. *Clark*, 393 U.S. 316, ruled that the suit was barred by Section 10(b)(3) of the Military Selective Service Act of 1967, and dismissed the complaint. In affirming, a divided court of appeals[6] held that pre-

[4] While this appeal was pending, petitioner made a second request of the State Director for "a statement of your reasons for raising my classification of I–O to the Southern District Appeal Board" (A. 82). He was advised that, in the "opinion of the State Director," he "did not qualify for a deferment in Class I–O as a conscientious objector," and that the decision to appeal "was based upon the information contained in [his] selective service file" (A. 84). This exchange was not before the National Appeal Board.

[5] Petitioner's earlier order of induction had been cancelled (*supra*, pp. 8–9); no new order to report has yet been issued.

[6] Judge Blumenfeld of the District of Connecticut, sitting by designation, wrote the majority opinion. Judge Hays concurred in that opinion, but also relied separately on petitioner's failure to establish the $10,000 jurisdictional amount under 28 U.S.C. 1331 (A. 104). Then Chief Judge Lumbard dissented, concluding that this case was controlled by the decisions of this Court in *Oestereich* v. *Selective Service Board*, 393 U.S. 233,

induction judicial review could not "be obtained simply by framing issues in terms of purely legal questions divorced from their factual context, a tour de force attempted by the appellant in this case" (A. 102; footnote omitted).

SUMMARY OF ARGUMENT

I

In 1967, Congress amended Section 10(b)(3) of the Selective Service Act to foreclose judicial review of "classification and processing" questions under the statute until the complaining registrant "has responded either affirmatively or negatively to an order to report for induction * * *" (50 U.S.C. App. (Supp. V) 460(b)(3)). This Court, in order to reconcile the sweeping language of that provision with certain of the exemption provisions of the same Act, construed Section 10(b)(3) to permit limited preinduction judicial review where unauthorized administrative action had deprived the registrant, for reasons wholly unrelated to the merits of his claim, of a statutory exemption to which he was clearly entitled as a matter of law.

Petitioner comes before this Court seeking a similar construction of the statute with respect to his procedural due process claims; but he is here before he has been ordered to report for induction. In these circumstances, the controversy is not justiciable and his claims are not yet ripe for adjudication.

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and *Breen* v. *Selective Service Board*, 396 U.S. 460. In his view, petitioner, though not yet given the opportunity to do so, could sustain his allegation that the amount in controversy exceeds $10,000, as required by 28 U.S.C. 1331 (A. 104–120).

At all events, preinduction judicial review under Section 10(b)(3) is inappropriate in this case. Petitioner has been assigned a I-A classification on the basis of an evaluation of the merits of his claim by the State Appeal Board and the National Appeal Board. The courts cannot determine whether he is entitled to conscientious objector status without an examination of his Selective Service file to ascertain if the administrative denial of his claim was without factual basis. Congress has restricted judicial review in such circumstances to proceedings after the registrant has responded to an order of induction to prevent litigious interruptions in the induction process. Where, as here, the registrant is not clearly entitled to a specific exemption from service that Congress provided, there is no occasion to create an implied exception to the congressional directive in Section 10(b)(3) that judicial review of classification is to be postponed until after induction or refusal to report for induction.

This is especially so in the present case, where the challenged procedures were not without statutory basis. Congress has mandated that the decisions of local boards "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe" (50 U.S.C. App. 460(b)(3)). By regulation, the President has authorized State Directors of Selective Service to take an appeal "from any determination of a local board at any time" (32 C.F.R. 1626.1). Pursuant to that authority, the State Director in this case noticed an appeal from the local board's decision to classify

petitioner I–O. He submitted no statement of reasons for his action to the State Appeal Board or to petitioner. On a *de novo* review of the information in petitioner's Selective Service file, the State Appeal Board reached a contrary conclusion from the local board.

Such procedures were not improper; they were not unauthorized by statute. Even if it ultimately were determined that the action of the State Appeal Board cannot stand because petitioner had presented a *prima facie* claim and no reasons had been stated for denial of his claim, that decision necessarily would turn on a review of the administrative judgment in evaluating the evidence—*i.e.*, on an analysis of the information in petitioner's Selective Service file to ascertain whether he set forth a *prima facie* claim. Such judicial scrutiny of administrative fact-finding processes involves precisely the type of litigious interruption with preinduction proceedings that Congress intended to eliminate by the bar of Section 10(b)(3). This Court has not hesitated to apply that bar where, as here, it can do so without infringing on a registrant's uncontroverted right to exemption under another provision of the Act.

II

In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which require that "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs" (28 U.S.C. 1331, 1332).

Congress has thus conditioned access to the federal courts on a registrant's ability to establish that his dispute involves a minimum monetary amount. The federal courts may not ignore this limitation even though it may bar consideration of cases that otherwise bring into question significant federal rights. This is not one of those situations where Congress has made a specific determination to allow suits without any showing of jurisdictional amount, as it has in various Civil Rights Acts and other statutes. Accordingly, even if it be determined that this preinduction civil suit is justiciable and not barred by Section 10(b)(3), petitioner should be required to demonstrate that the monetary amount in controversy satisfies the $10,000 jurisdictional requirement of Section 1331.

ARGUMENT

I. INTRODUCTION

In order to bring the question before the Court into sharper focus, we preface our analysis of the issues with a brief statement of what is not at issue here.

This Court is not now called upon to determine whether petitioner's assigned classification is wholly without factual basis. Administrative action which "inescapably involves a determination of fact and an exercise of judgment" is undeniably outside the permissible scope of preinduction judicial review. *Clark* v. *Gabriel,* 393 U.S. 256, 258. Similarly, there is no question in this case *whether* petitioner can obtain

judicial review of the administrative appeal procedures followed by Selective Service in processing his claim to conscientious objector status. Congress has mandated in Section 10(b)(3) of the Military Selective Service Act (50 U.S.C. App. 460(b)(3)) that those procedures are subject to scrutiny by the courts, but only in habeas corpus proceedings after induction[7] or in a criminal prosecution for wilful refusal to submit to induction. And, as this Court recognized in *Clark* v. *Gabriel, supra,* 393 U.S. at 259, this limited statutory option suffers no constitutional infirmity because the registrant called upon to respond "either affirmatively or negatively to an order to report for induction" (50 U.S.C. App. 460(b)(3)) has claimed exemption as a conscientious objector.

Thus, the question here is simply one of timing: whether, in the particular circumstances of this case, petitioner's procedural due process challenge to the manner in which his conscientious objector claim was processed by Selective Service warrants an acceleration of the judicial review to which he plainly is entitled at a later date. For the reasons set forth below, we think not.

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[7] While Section 10(b)(3) does not specifically preserve the habeas corpus remedy, the clear intent of Congress (see H. Rep. No. 267, 90th Cong., 1st Sess. 30–31; S. Rep. No. 209, 90th Cong., 1st Sess. 10) was to adhere to the then prevailing judicial precedents which plainly permitted habeas corpus to test the validity of induction. See *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 235–236; *Witmer* v. *United States*, 348 U.S. 375, 377.

II. SECTION 10(b)(3) SHOULD NOT BE EXPANDED TO PERMIT PREINDUCTION JUDICIAL REVIEW OF THE PROCEDURAL DUE PROCESS CLAIMS RAISED IN THIS CASE

A. THE SCOPE OF PREINDUCTION JUDICIAL REVIEW

1. Prior to 1967, the conscription statutes in this country contained no explicit provision relating to judicial review of draft classifications by the Selective Service System.[8] Congress had simply provided that the decision of local and appeal boards were to be "final."[9] These finality provisions, however, have long been construed by this Court as indicating a legislative intent to restrict only the scope of judicial review, not to deprive the registrant of all access to the courts. Thus, two early cases, *Falbo* v. *United States*, 320 U.S. 549, and *Estep* v. *United States*, 327 U.S. 114, established that the courts could entertain a challenge to an administrative denial of a claimed exemption or deferment from military service after a registrant had exhausted his administrative remedies within the Se-

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[8] Selective Draft Act of 1917, ch. 15, § 4, 40 Stat. 80; Selective Training and Service Act of 1940, ch. 720, § 10(a)(2), 54 Stat. 893, amending the prior law, which had deemed a registrant to be under the jurisdiction of the military from the date of the induction order, to provide that a registrant was not subject to military jurisdiction until actual induction; 54 Stat. 895); Selective Service Act of 1948, ch. 625, § 10(b)(3), 62 Stat. 620; Universal Military Training and Service Act of 1951, ch. 144; § 10(b)(3), 65 Stat. 87, 50 U.S.C. App. 460(b)(3).

[9] Moreover, § 13(b) of the 1948 Act, 50 U.S.C. App. 463(b), explicitly excepted the Selective Service System from the provision relating to judicial review of action by other administrative agencies in the Administrative Procedure Act, 5 U.S.C. 1009, as amended, 5 U.S.C. (Supp. V) 701–706.

lective Service System.[10] But judicial relief was confined to cases in which there was "no basis in fact" for the assigned classification (327 U.S. at 122–123; and see *Witmer* v. *United States*, 348 U.S. 375), or in which the administrative action was in direct conflict with the statute (327 U.S. at 120), or the regulations (327 U.S. at 121). Moreover, most courts considered review to be barred completely by the finality provisions except in a criminal prosecution for refusal of induction (see, *e.g.*, *Estep* v. *United States*, *supra*; *Witmer* v. *United States*, *supra*) or on a petition for habeas corpus after submission to induction (see, *e.g.*, *Billings* v. *Truesdell*, 321 U.S. 542; *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 311–312).[11] See

[10] While this Court has since recognized that a relaxation of the exhaustion doctrine may be appropriate in criminal prosecutions under 50 U.S.C. App. 462, where the sole question is purely a legal one of statutory interpretation (*McKart* v. *United States*, 395 U.S. 185), it has recently reaffirmed the vitality of that requirement as a condition to judicial review in the absence of highly unusual circumstances that might legitimately excuse the failure to exhaust. See *McGee* v. *United States*, No. 362, October Term, 1970, decided May 17, 1971.

[11] Before 1967, only three cases permitted preinduction judicial review. In *Tomlinson* v. *Hershey*, 95 F. Supp. 72 (E.D. Pa.), the court, without discussing reviewability, permitted injunctive and declaratory relief on the ground that the local board's failure to act on the plaintiff's request for deferment invalidated the order of induction. *Ex parte Fabiani*, 105 F. Supp. 139 (E.D. Pa.), involved a termination of a II–S deferment to a medical student because the medical school he attended was in a foreign country. The district court ruled that such action by the board was contrary to the regulations and without basis in fact; it rejected the government's jurisdictional argument under the finality provisions and enjoined enforcement of the induction order. A similar result was reached in

cases collected in Comment, *Anticipatory Attacks on Selective Service Classifications*, 117 U. Pa. L. Rev. 899, 900 n. 10 (1969).

In 1967, the Second Circuit broke with these earlier decisions in the highly publicized case, *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, a civil action seeking preinduction judicial review. The case involved a delinquency reclassification of registrants who had been placed in Class I–A for participating in demonstrations at their local draft boards in protest against the conflict in Vietnam. Suit was commenced before the issuance of induction orders and while administrative appeals were still pending. Even so, the court, while acknowledging that relief prior to induction would ordinarily be unavailable, intervened because first amendment rights were thought to be involved. Relying on *Dombrowski* v. *Pfister*, 380 U.S. 479, the Second Circuit concluded that the action by the local boards was by nature punitive, that it had the effect of unlawfully [12] inhibiting activity arguably protected by the First Amendment, and that, therefore, it required immediate judicial intervention (372 F. 2d at 823–825).

2. Congress reacted promptly to the *Wolff* decision. In the Military Selective Service Act of 1967, 50

Townsend v. *Zimmerman*, 237 F. 2d 376 (C.A. 6), where the court, without considering the finality provisions, set aside an induction order which, because issued during the pendency of plaintiff's administrative appeal, violated 32 C.F.R. 1626.41.

[12] The court found that the local boards lacked authority to use their delinquency-reclassification power for punitive purposes, and in so doing they had exceeded their jurisdiction by reclassifying plaintiffs (372 F. 2d at 820–822).

U.S.C. App. (Supp. V) 451 *et seq.*, the finality provisions were amended to provide (50 U.S.C. App. (Supp. V) 460(b)(3)):

> No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title * * * after the registrant has responded either affirmatively or negatively to an order to report for induction * * *: *Provided,* that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President, only where there is no basis in fact for the classification assigned to such registrant.

The legislative history reflects that the House Armed Services Committee added this language[13] in order more clearly to reenunciate "the principle already in existing law" (H. Rep. No. 267, 90th Cong., 1st Sess. 7),[14] and that the provision was intended as a

[13] The 1967 amendments to the Selective Service Act as initially passed by the Senate made no change in the finality provision; however, the Senate committee emphasized that the original congressional intent was not to permit judicial review prior to induction (S. Rep. No. 209, 90th Cong., 1st Sess. 10):

> Until recently there was no problem in the observance of the finality provision. In several recent cases, however, district courts have been brought into selective service processing prematurely. The committee attaches much importance to the finality provisions and reemphasizes the original intent that judicial review of classifications should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction.

[14] It is generally recognized that the amendment does not alter the scope of review as earlier established by this Court in *Estep, supra,* and its progeny. See generally O'Neil, *Review of Selective Service Reclassifications*, 37 Geo. Wash. L. Rev. 536, 543 (1969).

direct response to those few judicial decisions that had permitted preinduction judicial review. The report of the House committee pointedly explained (H. Rep. No. 267, 90th Cong., 1st Sess. 30-31):

> The committee was disturbed by the apparent inclination of some courts to review the classification action of the local or appeal boards before the registrant had exhausted his administrative remedies. Existing law quite clearly precludes such a judicial review until after a registrant has been ordered to report for induction and has responded either affirmatively or negatively to such an order. In view of this inclination of the courts to prematurely inquire into the classification action of local boards, the committee has rewritten this provision of the law so as to more clearly enunciate this principle.

The committee's proposed language was approved by the House and accepted by the Senate in conference (H. Conf. Rep. No. 346, 90th Cong., 1st Sess.). Congress' stated objective was "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426; Sen. Russell).

Such interruptions inevitably occur in any case where preinduction judicial review is sought, particularly where—as usually happens—the suit is not filed until shortly before induction is scheduled. In such circumstances, the induction order usually is stayed and further processing of the registrant at the induction station is postponed pending the outcome of litigation. Nor is this disruptive effect eliminated where, as here, the registrant has exhausted his ad-

ministrative appeal remedies. See *Clark* v. *Gabriel*, *supra*, 393 U.S. at 258. Preinduction review still causes precisely the sort of "litigious interruptions" which Congress sought explicitly to preclude in Section 10(b)(3) so as not to "seriously affect the administration of the Selective Service System" (H. Rep. No. 267, 90th Cong., 1st Sess. 31).

3. A challenge to the constitutionality of amended Section 10(b)(3) was not long in coming to this Court. In two cases decided on the same day, the Court upheld its constitutionality (*Clark* v. *Gabriel*, *supra*), but construed it to permit preinduction judicial review in a carefully circumscribed category of cases (*Oestereich* v. *Selective Service Board*, 393 U.S. 233).

Oestereich involved a registrant who undeniably qualified for exemption from military service as a student "preparing for the ministry" within the meaning of 50 U.S.C. App. 456(g).[15] His IV-D classification had been revoked by the local board, not for any reason relating to the merits of his ministerial claim, but because he had returned his registration certificate to the government as an expression of dissent from the policies of this country relating to Vietnam. He was declared "delinquent," pursuant to Selective Service regulation 32 C.F.R. 1642.4(a), for failing to retain possession of his registration certificate (32 C.F.R. 1617.1), and was reclassified I-A. After un-

[15] The government did not dispute that Oestereich had fully satisfied the requirements of the exemption provision (393 U.S. at 235 n. 3, 238). By contrast, petitioner's conscientious objector claim in the instant case is disputed (see n. 44, *infra*).

successfully pursuing an administrative appeal, he sought preinduction judicial review of his delinquency reclassification.

This Court, in holding that the civil suit was not barred by Section 10(b)(3), determined that there were three factors that justified excepting that case from "the normal operations of the Act" (393 U.S. at 238): (1) The registrant fully qualified for a statutory exemption under 50 U.S.C. App. 456(g). (2) The board's revocation of that exemption by a delinquency classification was without congressional authorization. (3) The challenged local board action had concededly been based on behavior by the registrant completely extraneous to the board's evaluation of the claimed exemption. It was this set of "unusual circumstances" (*Gutknecht* v. *United States*, 396 U.S. 295, 303) which prompted the Court to declare that, "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption" (393 U.S. at 237). Thus, precisely because it could then be ascertained with legal certainty that Oestereich qualified for exemption from military service, the Court concluded that to apply the Section 10(b)(3) bar to judicial review in this case "is to construe the Act with unnecessary harshness" (393 U.S. at 238).

The contrary result reached the same day in *Clark* v. *Gabriel, supra,* points up the narrow scope of the *Oestereich* decision. There, a registrant claiming exemption as a conscientious objector challenged in a

preinduction suit the local board's action in classifying him I–A. He contended that his classification "had no basis in fact, that the Board had misapplied the statutory definition of conscientious objector, and that the members of the Board were improperly motivated by hostility and bias against those who claim to be conscientious objectors" (393 U.S. at 257). Thus, the challenge in *Gabriel* was premised on contentions that the administrative action had violated fundamental notions of constitutional due process and had been grounded on considerations unrelated to the merits of the claimed exemption. This Court, however, found it unnecessary to reach these questions under the rule laid down in *Oestereich*, stating (393 U.S. at 258–259):

> Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the Board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. * * * To allow pre-induction judicial review of such determinations would be to permit precisely the kind of "litigious interruptions of procedure to provide necessary military manpower" * * * which Congress sought to prevent when it enacted § 10(b)(3).

Consequently, the case was remanded with instructions to dismiss it (393 U.S. at 259).[16]

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[16] Petitioner is thus correct that the due process contentions raised in *Gabriel* were not at that time properly before the Court. He asserts, however, that such contentions could not be considered by this Court in *Gabriel* because they were not raised in the lower courts. If that indeed is a basis for the *Gabriel* decision, petitioner should not now be permitted to raise here

Read together, *Oestereich* and *Gabriel* establish a construction of Section 10(b)(3) that precludes pre-induction review in the generality of situations where the local and appeal boards have applied their judgment and exercised their discretion, but permits such review where unauthorized administrative action has deprived the registrant, for reasons wholly unrelated to the merits of his claim, of a statutory exemption to which he is clearly entitled as a matter of law. A literal application of Section 10(b)(3) in the latter situation would conflict with the specific exemptions the Act provides.

In thus reconciling statutory provisions which, because of their sweeping terms, their overlap, or otherwise, are superficially inconsistent, the Court in *Oestereich* followed the settled practice of interpreting them so as to do the least violence to each, while at the same time best effectuating the overall design of the statute. *Williams* v. *Pritchard,* 4 Term Rep. 2; *Peck* v. *Jenness,* 7 How. 612, 623;[17] *New Lamp Chimney Co.* v. *Ansonia Brass and Copper Co.,* 91 U.S. 656, 663; *United States* v. *Moore,* 95 U.S. 760, 763.[18] See also *Spies* v. *United States,* 317 U.S.

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for the first time the contention that the State Director had no statutory authority to take an appeal from the local board's classification. See discussion *infra*, p. 38.

[17] In *Peck*, the Court stated: "One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

[18] In *Moore*, the Court stated: "In cases like this, the construction should be such that both provisions, if possible, may stand."

492; *Achilli* v. *United States*, 353 U.S. 373; *Sansone* v. *United States*, 380 U.S. 343. The congressional intent to prevent "litigious interruptions," it concluded, must be tempered when the local or appeal boards' action is "without statutory basis *and* in conflict with [the registrant's] rights explicitly established by statute *and* not dependent upon an act of judgment" (393 U.S. at 258; emphasis added).

Such was the case in *Breen* v. *Selective Service Local Board No. 16*, 396 U.S. 460. There, the registrant lost a student (II–S) deferment—for which the government conceded he was fully qualified (396 U.S. at 463–464)—because his local board had assigned him a I–A delinquency classification (32 C.F.R. 1642.12) on the ground that he had surrendered his draft card at a public gathering in protest against the conflict in Vietnam. This Court, rejecting the argument that the case fell outside the narrow scope of preinduction review under Section 10(b)(3) because it involved revocation of a statutory deferment rather than a statutory exemption (396 U.S. at 466–467), found that *Oestereich* was indistinguishable (393 U.S. at 467–468):

> In both situations a draft registrant who was required by the relevant law not to be inducted was in fact ordered to report for military service. In both cases the order for induction involved a "clear departure by the Board from its statutory mandate," * * *, and in both cases § 10(b)(3) of the Act should not have been construed to require the registrants to submit to induction or risk criminal prosecution to test the legality of the induction order. * * *

See also *Kolden* v. *Selective Service Board No. 4*, 397 U.S. 47, where the Court vacated the judgments in several cases involving delinquency reclassifications and remanded them to their respective courts of appeals for further consideration in light of *Breen*.[19]

By contrast, preinduction judicial review was held unavailable in *Boyd* v. *Clark*, 393 U.S. 316. There, four Selective Service registrants holding I–A classifications challenged the validity of Section 6(h)(1) of the Act (50 U.S.C. App. 456(h)(1)) on the ground that student deferments in general unconstitutionally discriminate against registrants economically unable to attend college, and bear no reasonable relationship to the purposes of the Act. As pointed out by the court below (A. 102–103):

> In *Boyd*, the plaintiffs challenged their classification on several legal grounds without in any way contesting the discretionary or fact-finding aspects of the local board's decision to classify them I–A. *See* opinion below, *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D.N.Y. 1968). Indeed, among the constitutional claims asserted in *Boyd* were some which had a source in common with those asserted by the appellant here: the due process clause of the fifth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

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[19] In each of these cases, the registrant had held a statutory deferment to which he was concededly entitled prior to his unlawful (*Gutknecht* v. *United States*, 396 U.S. 295) delinquency reclassification: *Kolden* v. *Selective Service Board No. 4*, 406 F. 2d 631 (C.A. 8) (graduate student); *Kraus* v. *Selective Service System Local 25*, 408 F. 2d 622 (C.A. 4) (hardship deferment); *Anderson* v. *Hershey*, 410 F. 2d 492 (C.A. 6) (undergraduate student); *Chaikin* v. *Selective Service Board*

Nevertheless, this Court, relying on *Clark* v. *Gabriel, supra,* held that Section 10(b)(3) barred preinduction review. Unlike *Oestereich* and *Breen,* the claimants in *Boyd* had not established uncontroverted entitlement to an exempt or deferred status mandated by statute; they had not demonstrated that the board's action was unauthorized; nor had they shown that their classification had been based upon conduct unrelated to the merits of a claim for exemption or deferment. In these circumstances, a construction of the Act which required them to respond to an arguably valid induction order as a condition to judicial review of their constitutional claims did not produce the "unnecessary harshness" that led to the decisions in *Oestereich* and *Breen.*[20]

4. This Court has thus permitted preinduction judicial review only in those few situations where such review has been necessary to reconcile Section 10(b)(3) of the Selective Service Act with the explicit mandate in the statute that persons concededly entitled

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No. 66, C.A. 2, No. MR-2711, decided March 12, 1969 (undergraduate student); *Faulkner* v. *Laird,* C.A. 2, No. 1657, decided May 1, 1969 (occupational deferment); *Osher* v. *Selective Service Board No. 6,* C.A. 2, No. 33543, decided May 1, 1969 (graduate student).

[20] The dissent below reads *Boyd* as resting solely on the fact "that petitioners there had not reached a position of finality within the system" (A. 109–111). Even if that be true, petitioner in the instant case is similarly situated, since his earlier order to report was cancelled and no new induction order has been issued. At all events, we think that the "position of finality" that existed in *Oestereich* and *Breen*—*i.e.*, that the board had "finally" determined that the registrants qualified for exemption or deferment *on the merits of their claim*—cannot be said to exist here any more than it did in *Boyd.* See discussion *infra* at pp. 34–37.

to a statutory exemption or deferment shall not be subject to military "training and service". Most courts of appeals that have been called upon since 1967 to construe Section 10(b)(3) have adopted a similar approach.

Registrants have generally been permitted prior to induction to attack delinquency reclassifications which deprived them of the exemption or deferment that they were initially assigned by their local boards. See, *e.g.*, *Shea* v. *Mitchell*, 421 F. 2d 1162 (C.A.D.C.); *United States* v. *Imus*, 398 F. 2d 816 (C.A. 10); *McMillen* v. *Mitchell*, 2 SSLR 3464 (C.A. 7); and see cases cited at n. 19 *supra*. Similarly, appellate courts have allowed preinduction review of board denials of statutory I–S deferments [21] to graduate students who had received induction orders during the academic year. See, *e.g.*, *Carey* v. *Local Board*, 297 F. Supp. 252 (D. Conn.), affirmed, 412 F. 2d 71 (C.A. 2); *Nestor* v. *Hershey*, 425 F. 2d 504 (C.A.D.C.); *Bowen* v. *Hershey*, 410 F. 2d 962 (C.A. 1) (on stay pending appeal), on merits *sub nom. Crane* v. *Hershey*, 410 F. 2d 966 (C.A. 1); *Foley* v. *Hershey*, 409 F. 2d 827 (C.A. 7).

In the I–S cases, as in *Oestereich* and *Breen*, it was uncontested that the complainants qualified for deferment under the statute—*i.e.*, they were students pursuing a full-time course of study at a recognized educational institution and had been called up before the end of the academic year. Moreover, a denial of deferment on the ground that it was available only to

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[21] Section 6(i)(2), 50 U.S.C. App. 456(i)(2) mandates that a student who has been ordered for induction "shall" be deferred—under a I–S classification (32 C.F.R. 1622.15(b))—until the end of the current academic year.

undergraduates was contrary to the statutory provisions and hence beyond the authority of the local board. See generally Griffiths and Heckman, *Eligibility for I–S of Registrants Holding Graduate II–S Since July 1, 1967*, 1 SSLR 4041 (1968). Finally, the challenged administrative action was not dependent upon an act of judgment by the board in determining facts and evaluating evidence. Cf. *McKart* v. *United States*, *supra*, 395 U.S. at 197–199. Accordingly, the claims were held to be covered by this Court's decisions in *Oestereich* and *Breen*."

On the other hand, Section 10(b)(3) generally has been held to bar preinduction suits challenging the *procedures* used by local boards in the classification process. For example, the contention that the local board improperly refused to reopen a registrant's classification has been held insufficient to permit judicial intervention prior to induction. See, *e.g.*, *Lane* v. *Local Board No. 17*, 3 SSLR 3759 (C.A. 1); *Ferrell* v. *Selective Service Board*, 434 F. 2d 686 (C.A. 2); *Morgan* v. *Melchar*, C.A. 3, No. 18,697, decided May 5, 1971;[22] *Blatt* v. *Local Board No. 116*, C.A. 4, No.

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[21] Compare *Gregory* v. *Tarr*, 436 F. 2d 513 (C.A. 6), certiorari denied, No. 1625, October Term, 1970, June 28, 1971, denying preinduction review of a denial to a graduate student of a fatherhood (III–A) deferment under 32 C.F.R. 1622.30(a). The Court there rejected the argument that the President was without statutory authority to promulgate a regulation depriving graduate students of fatherhood deferments. The plaintiffs in that case were not clearly entitled to a statutory deferment which had been denied them by action of the board that was unauthorized by statute. And see *Evans* v. *Local Board No. 73*, 425 F. 2d 323 (C.A. 10).

[22] We do not read the *en banc* decision by the Third Circuit in *Hunt* v. *Local Board*, 438 F. 2d 1128, as holding otherwise.

15,122, decided June 8, 1971; *Edwards* v. *Selective Service Board No. 111*, 432 F. 2d 287 (C.A. 5); *Czepil* v. *Hershey*, 425 F. 2d 251 (C.A. 7), certiorari denied *sub nom. Czepil* v. *Tarr*, 400 U.S. 849; *Bookout* v. *Thomas*, 430 F. 2d 1343 (C.A. 9); *Rheingans* v. *Mitchell*, 438 F. 2d 345 (C.A. 9); *Sloan* v. *Local Board*, 414 F. 2d 125 (C.A. 10). The courts similarly have refused to entertain the preinduction claim that the registrant was ordered for induction out of turn under the random selection lottery system. See, *e.g.*, *Green* v. *Selective Service Board No. 87*, 419 F. 2d 813 (C.A. 8), certiorari dismissed, 397 U.S. 1059; *Stella* v. *Selective Service Board No. 66*, 427 F. 2d

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There, only one of the five judges that joined to uphold pre-induction review concluded that the board's refusal to reopen came within the *Oestereich-Breen* construction; essentially, he adopted the position expressed by Mr. Justice Harlan in his separate opinion in *Oestereich* (393 U.S. at 239–245). Since three of the remaining judges comprising the *Hunt* majority based their opinion on the district court decision in *Gregory* v. *Tarr*, 311 F. Supp. 1 (E.D. Mich.), which has since been reversed by the Sixth Circuit (see n. 22 *supra*), the *en banc* decision in *Hunt* seems to have little, if any, vitality. The subsequent panel decision in *Morgan*, *supra*, now pending on petition for rehearing *en banc*, seems to confirm this.

Petitioner also relies heavily on *Swift* v. *Director of Selective Service*, 3 S.S.L.R. 3839 (C.A.D.C.), where the court initially concluded that the refusal of the local board to consider a post-induction notice claim of conscientious objection was "blatant lawless[ness]" within the meaning of *Oestereich* (393 U.S. at 238). Since that decision, however, this Court has decided *Ehlert* v. *United States*, No. 120, October Term, 1970, decided April 21, 1971. The Court of Appeals for the District of Columbia Circuit subsequently reconsidered its decision in *Swift* in light of *Ehlert*; it vacated its earlier opinion and held the suit to be barred by Section 10(b)(3). See *Swift* v. *Director of Selective Service*, C.A.D.C., No. 24,137, decided July 16, 1971.

887 (C.A. 2).[24] Section 10(b)(3) has also been held to preclude review before induction of a challenge to the residential composition of the local board. See, *e.g.*, *Sellers* v. *McNamara*, 398 F. 2d 893 (C.A. 5), certiorari denied, 395 U.S. 950; *Czepil* v. *Hershey*, *supra*.

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[24] The contrary result reached by the Eighth Circuit in *Liese* v. *Local Board No. 102*, 440 F. 2d 645, is, we think, premised on an erroneous reading of *Oestereich* and *Breen*. In the view of that court, Section 10(b)(3) can be construed to permit preinduction judicial review of "the merits in some detail" in cases "where solely legal questions which are not clearly unmeritorious are presented." Cf. *Oestereich*, *supra*, 393 U.S. at 239–245 (Mr. Justice Harlan, concurring). This approach, we submit, overlooks the essential purpose behind the construction of Section 10(b)(3) enunciated in *Oestereich* and *Breen*—*i.e.*, to accommodate the clear statutory mandate embodied in the exemption and deferment provisions of the Act, which might otherwise be in conflict with the congressional mandate in Section 10(b)(3). Moreover, it calls for precisely the type of factual analysis that causes the "litigious interruptions" Congress sought to prevent. See *Clark* v. *Gabriel*, *supra*. Indeed, as later decisions in the Eighth Circuit indicate, unless there is clear entitlement to a statutorily mandated exemption or deferment, the *Liese* approach opens wide the door to preinduction judicial review in virtually every instance where it is claimed that the draft board acted beyond its authority or jurisdiction. See, *e.g.*, *Zerillo* v. *Local Board No. 102*, 440 F. 2d 136 (C.A. 8); *McLain* v. *Selective Service Local Board No. 47*, C.A. 8, No. 20,217, decided March 30, 1971; *Drake* v. *Selective Service Local Board No. 50*, C.A. 8, No. 20,477, decided May 10, 1971; *Wright* v. *Selective Service Local Board No. 105*, C.A. 8, No. 71-1011, decided June 10, 1971; *Ryan* v. *Hershey*, C.A. 8, No. 20,092, decided June 18, 1971. Such a construction, we submit, deprives Section 10(b)(3) of any meaning; for, it has long been settled that the only grounds for reviewing draft board actions in any type of judicial proceeding—whether pre-induction or post-induction—is that the board acted without authority or beyond its jurisdiction (see *Estep* v. *United States*, *supra*, 327 U.S. at 119–123).

In each of the above situations, the procedural attack was made in the context of a genuine dispute over the particular complainant's draft status and thus application of the Section 10(b)(3) bar to judicial review conflicted with neither a statutorily mandated exemption, as in *Oestereich*, nor a statutorily mandated deferment, as in *Breen*.[25] See *Morgan* v. *Melchar, supra,* slip op. 12. Nor, as this Court indicated in *Boyd, supra,* did the fact that the question was framed in terms of a constitutional challenge—as petitioner has done in the present case—eliminate the obstacle that there existed no uncontroverted

[25] Nor were the procedures challenged in the above court of appeals' cases themselves contrary to an explicit statutory mandate; they were, instead, under attack as an abuse of the board's discretionary powers under the regulations. Even if this had not been the situation, however, and it could be shown that the questioned procedure conflicted with a statutorily mandated *procedure*, that alone would not warrant preinduction review under the *Oestereich-Breen* construction of Section 10 (b)(3). For, as already indicated, the *Oestereich-Breen* construction was required to reconcile the sweeping language of Section 10(b)(3), proscribing all judicial review prior to induction, with exemption provisions that mandated no induction for those who clearly qualified. But, no such clash would exist when dealing with a statutorily mandated *procedure*; it alone does not by its terms exempt or defer a person from military service. Thus judicial review of the questioned procedure could appropriately take place after induction under Section 10 (b)(3) without clashing with any other congressional mandate. It is only when the procedure—whether embodied in statute or regulation—is exercised in such a way that it deprives a registrant of an exemption or deferment to which he is undeniably entitled under the statute that Section 10(b)(3) need be construed to permit preinduction review. That was precisely the situation with respect to the delinquency reclassification procedures involved in *Oestereich* and *Breen*. See, *e.g.*, *Lane* v. *Local Board No. 17, supra,* 3 SSLR at 3760.

right under the statute to be immune from military service. See, *e.g.*, *Steiner* v. *Officer in Command*, 436 F. 2d 687, certiorari denied, June 1, 1971, No. 1582, 1970 Term (C.A. 5); *Edwards* v. *Selective Service Board No. 111, supra; Czepil* v. *Hershey, supra; Coleman v. Local Board No. 61*, 432 F. 2d 225 (C.A. 10).

B. SECTION 10(b)(3) BARS PREINDUCTION REVIEW OF PETITIONER'S CLAIMS

Under the foregoing decisions and analysis, we submit that Section 10(b)(3) bars preinduction judicial review of the procedural due process claims raised here.

1. Before reaching that question, however, we think that the Court can properly decide the instant case without considering the Section 10(b)(3) issue. Here, no order of induction has been issued to petitioner since he received his I-A classification from the National Appeal Board (*supra*, n. 5),[26] and thus the case is not ripe for adjudication. See *Boyd* v. *Clark*, 287 F. Supp. 561 (S.D. N.Y.), affirmed on other grounds, 393 U.S. 316.[27]

Courts have generally refrained from reviewing attacks—whether constitutional or otherwise—upon

[26] The order of induction referred to by the dissent below (A. 111), as a basis for distinguishing this case from *Boyd*, had been cancelled at the time a notice of appeal was filed with the National Appeal Board; such cancellation was expressly required by 32 C.F.R. 1627.8. No new induction order has been issued.

[27] As pointed out earlier (*supra*, pp. 25–26), this Court affirmed *per curiam* on the authority of *Clark* v. *Gabriel*, without reaching the "ripeness" issue that was decided by the three-judge district court.

statutes or regulations that have not yet been applied against the plaintiffs, since, as a general rule, there then exists no justiciable case or controversy within the meaning of article III of the Constitution. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–91. A limited exception to this policy of abstention, however, has been recognized where the challenged activity is thought to have a "chilling effect" (*Dombrowski* v. *Pfister, supra*) on basic rights of expression under the First Amendment (see *Wolff* v. *Selective Service Local Board No. 16, supra; National Student Association* v. *Hershey*, 412 F. 2d 1103 (C.A. D.C.)). But, in the absence of such exceptional circumstances, as is the case here, both *Wolff* and *National Student Association* indicate that a preinduction Selective Service action filed prior to receipt of an induction order will not be ripe for adjudication. And see *Boyd* v. *Clark, supra*, 287 F. Supp. at 563–564; *Feldman* v. *Local Board No. 22*, 239 F. Supp. 102, 105–106 (S.D. N.Y.); *Westerbeke* v. *Local Draft Board No. 2*, 118 F. Supp. 441, 444 (E.D. N.Y.).

The reasons are manifold. A registrant who has not yet been issued an induction order is not entitled to injunctive relief because he cannot show "irreparable harm." See *Watkins* v. *Rupert*, 224 F. 2d 47, 48 (C.A. 2); *Muhammad Ali* v. *Breathitt*, 268 F. Supp. 63, 65 (W.D. Ky.). Similarly, in such circumstances he is not "aggrieved." *Daniels* v. *United States*, 372 F. 2d 407, 414 (C.A. 9). Moreover, it has been held that he lacks standing because there exists no immediate danger of direct injury. See *Katz* v. *United States*, 287 F. Supp. 29 (S.D. N.Y.). Finally, there is the fact that the dis-

pute may become "moot" or "academic." See *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 823; *Feldman* v. *Local Board No. 42, supra,* 239 F. Supp. at 105. As the district court pointed out in *Boyd* (287 F. Supp. at 564), the plaintiff "may never be required to report for induction."

These considerations are particularly pertinent to the present suit. Petitioner is seeking injunctive relief with respect to an induction order which has not yet issued, and indeed, may never issue. His claims are thus premature and present no justiciable controversy that is ripe for adjudication.

2. At all events, we submit, Section 10(b)(3) of the Selective Service Act precludes preinduction review of petitioner's procedural claim. The administrative action under attack here was neither "without statutory basis" *nor* "in conflict with petitioner's rights explicitly established by the statute" *nor* independent of "an act of judgment" by the board. *Clark* v. *Gabriel, supra,* 393 U.S. at 258.

Petitioner is challenging a reclassification procedure which, like the reclassification procedure questioned in *Oestereich* and *Breen,* deprived him of a local board classification that would have permitted him to avoid certain military obligations. There the similarity ends, however. Both the ministerial (IV–D) exemption in *Oestereich* and the student (II–S) deferment in *Breen,* were revoked under the delinquency regulations because of "conduct or activities unrelated to the merits of granting or continuing that exemption" (393 U.S. at 237) or deferment. Such action, in each instance, required "no exercise of discretion by a

Board in evaluating evidence and in determining whether a claimed exemption [or deferment] is deserved" (393 U.S. at 238). Here, by contrast, the State Appeal Board's denial of petitioner's conscientious objector (I–O) classification that his local board had given him, and the similar ruling by the National Appeal Board, were based directly on an evaluation of the information contained in petitioner's Selective Service file; it was inextricably intertwined with the merits of his claim.[28]

Thus, petitioner's position in the present litigation is fundamentally different from that of the registrants in *Oestereich* and *Breen* when they came into court. With respect to petitioner, Selective Service has made a final determination on the merits of his claim—whether it be right or wrong—that he did *not* qualify for an exemption or deferment under the statute. With respect to the other two registrants, however, it had reached exactly the opposite conclusion on the merits prior to their delinquency reclassification. Consequently, the *Oestereich-Breen* analysis is inapposite; here we are not "able to say that it was plain on the record and on the face of the Act that an exemption had been granted * * *." *Oestereich* v. *Selective Serv-*

[28] Since it was the action of the State Appeal Board, and the National Appeal Board, that denied petitioner a I–O classification, that action is the proper focus of discussion. The action of the State Director in filing a notice of appeal did not alter petitioner's classification (see discussion *infra*, p. 43). Even that action, however, was premised on the State Director's evaluation of the information in petitioner's file. As stated in a letter to petitioner (A. 84), the decision to appeal "was based upon the information contained in [his] selective service file."

ice Board, supra, 393 U.S. at 238 n. 7; and see *Blatt* v. *Local Board No. 116, supra,* slip op. 7; *Steiner* v. *Officer in Command, supra,* 436 F. 2d at 689; *Evans* v. *Local Board, supra,* 425 F. 2d at 326. There is, "therefore * * * no clash between §10(b)(3) and another explicit provision of the Act." *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7."

Indeed, petitioner concedes (Pet. Br. 32) that underlying his procedural due process claim there is a dispute concerning "the discretionary judgment of the Appeal Board as to whether it is or is not supported by a basis in fact in the record." Such was the case in *Clark* v. *Gabriel, supra,* and the Court's conclusion there pertains with equal force here (393 U.S. at 259):

> We find no constitutional objection to Congress' thus requiring that assertion of conscien-

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" Even if petitioner's entitlement to conscientious objector status were uncontested—which it is not (see n. 44, *infra*)—there would not necessarily be a clash with the congressional mandate of Section 10(b)(3). The exemption and deferment in *Oestereich* and *Breen* entitled the registrants to be free from "training and service" (see 50 U.S.C. App. 456(g) and (h)). Thus, to require them to undergo induction before obtaining judicial review—as Section 10(b)(3) prescribes—is directly contrary to their clear rights under other provisions of the statute. But "[t]he only unconditional right conferred by statute upon conscientious objectors is exemption from *combatant* training and service" (*Ehlert* v. *United States, supra,* slip op. 4). "Conscientious objector status does per se excuse the registrant from induction * * *." *United States* v. *Beaver,* 309 F. 2d 273, 276 (C. A. 4), certiorari denied, 371 U.S. 951. Section 6(j) provides expressly that even where a claim "is sustained", a conscientious objector may be "inducted into the armed forces under this title" and "assigned to noncombatant service." The mere fact that a registrant has a clear right to exemption under that statutory provision, therefore, need not always produce a conflict with the Section 10(b)(3) bar to preinduction judicial review.

> tious objector's claims such as those advanced by appellee be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction. * * *

The fact that petitioner has asserted a general constitutional challenge to the Selective Service appeal procedures does not justify pre-induction review. In applying the bar of Section 10(b)(3) in *Gabriel*, this Court refused to consider a similar constitutional contention that the classification procedures of the local board violated procedural due process (see pp. 21–22 *supra*). And, as indicated above (*supra* pp. 25–26), the subsequent decision in *Boyd* v. *Clark*, *supra*, was a clear holding that, in the absence of a conflict with a congressional mandate in another explicit provision of the Act, the Section 10(b)(3) proscription may not be lifted to entertain preinduction review of broad constitutional challenges. And see cases cited at p. 32 *supra*.

3. If our analysis above is correct, it disposes of this case without the need for further discussion. But even if the administrative action involved here were arguably not in accordance with the prescribed statutory or regulatory procedures, judicial determination of that issue is precisely what Congress intended to reserve for post-induction review (50 U.S.C. App. 460(b)(3); and see *Estep* v. *United States*, *supra*, 327 U.S at 119–123). See n. 24 *supra*. A brief examination of petitioner's claims will demonstrate the need for continued adher-

ence to that settled policy "to prevent litigious interruptions of procedures to provide necessary military manpower" (113 Cong. Rec. 15426).

a. Petitioner asserts for the first time in this Court that the review of his I–O classification by the State Appeal Board was impermissible because the State Director had no authority under the statute to appeal the local board's determination. Since that issue was not raised at any time in the courts below (see n. 16 *supra*), we question whether it is properly before this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *California* v. *Taylor*, 353 U.S. 553, 557 n. 2; *De Sylva* v. *Ballentine*, 351 U.S. 570, 582; compare *Duigan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701–702. In any event, it is without merit.

The Selective Service System was designed by Congress for the purpose of mobilizing the nation's manpower in an orderly and efficient manner, with the least possible recourse to the courts on questions of classification. See, *e.g.*, *Falbo* v. *United States*, *supra*, 320 U.S. at 554; *Estep* v. *United States*, *supra*, 327 U.S. at 137 (Mr. Justice Frankfurter, concurring); *Witmer* v. *United States*, *supra*, 348 U.S. at 380–381. To this end, Congress explicitly authorized the President "to create and establish" within the System such "civilian local boards, civilian appeal boards, and such other civilian agencies" as may be necessary (50 U.S.C. App. 460(b)(3)) to insure "the opportunity for full administrative review" (*Mulloy* v. *United States*, 398 U.S. 410, 416) of claims to exempt or deferred status. He was also authorized to

appoint a State Director in each state to be in immediate charge of the administrative processes within his jurisdiction.

On this statutory framework, the President has constructed an elaborate administrative review machinery, pursuant to his express authority "to prescribe the necessary rules and regulations to carry out the provisions" of the Act (50 U.S.C. App. 460(b)(1)). Cf. *United States* v. *Palmer*, 223 F. 2d 893, 896 (C.A. 3), certiorari denied, 350 U.S. 873. Classification decisions are in the first instance committed to the discretion and judgment of local boards (see 50 U.S.C. App. 460(b)(3); 32 C.F.R. 1623 and 1624). Congress provided that the action of the local board "shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe" (50 U.S.C. App. 460(b)(3)). By regulations, the President has authorized that administrative appeals may be taken to State Appeal Boards by the registrant or by certain persons on behalf of the registrant, including a government appeal agent (32 C.F.R. 1626.2), and by "[e]ither the Director of Selective Service *or the State Director of Selective Service as to local boards in his state* * * * *from any determination of a local board at any time*" (32 C.F.R. 1626.1; emphasis added).[30]

[30] Appeals from a classification by the State Appeal Board may be taken to the President (whose authority is exercised by the National Appeal Board) by the registrant himself if the decision appealed from was not unanimous (32 C.F.R. 1627.3), or, regardless of the vote by the State Appeal Board, by either a State Director or the National Director when he "deems it to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1). See 50 U.S.C. App. 460(b)(3).

Petitioner maintains, however, that Congress did not intend these appeal procedures to apply in the limited situation where a local board determines that a registrant is entitled to conscientious objector status. He refers to the language in Section 6(j) of the Act (50 U.S.C. App. (Supp. V) 456(j)), which states: "Any person claiming exemption * * * because of such conscientious objections whose claim is sustained by the local board shall * * * be assigned to noncombatant service * * *."[11] Such language, however, was not intended to immunize from the appeal process favorable decisions by local boards under this exemption provision. Indeed, Congress so indicated in Section 10(b)(3) of the Act (50 U.S.C. App. 460(b)(3)):

> * * * local boards * * * shall, under rules and regulations prescribed by the President, have the power within [their] respective jurisdictions * * * to hear and determine, *subject to the right of appeal to the appeal boards herein authorized*, all questions or claims with respect to * * * exemption or deferment from,

[11] This language is unchanged from the pre-1967 law. The earlier provision contained additional language that was deleted in the 1967 Act, which entitled a registrant whose conscientious objector claim was "not sustained by the local board * * * to an appeal to the appropriate appeal board" and provided for an independent "inquiry and hearing" on such claim by the Department of Justice prior to a determination by the State Appeal Board (50 U.S.C. App. 456(j)). In removing these procedures, the House Armed Services Committee stated that "[r]egistrants claiming conscientious objection will therefore be awarded the same appeal procedures and administrative remedies that are available to all other registrants." 1967 U.S. Code Cong. & Admin. News, 90th Cong., 1st Sess., 1348.

> training and service under this title [including section 456(j)], of all individuals within the jurisdiction of such local boards. [Italics supplied.]

There is nothing in the statute to suggest, even inferentially, that this "right of appeal" extends only to the registrant, or persons acting on his behalf. Petitioner argues, however, that because of the Act's "silence and lack of specific authorization" (Pet. Br. 23), the Court should discern in the statutory scheme a legislative intent to withhold from State Directors the appeal authority that has been granted to them in 32 C.F.R. 1626.1. This Court, however, generally has refused to imply such limitations upon broadly delegated powers (cf. *Hannah* v. *Larche*, 363 U.S. 420), except where the exercise of those powers conflicts with an explicit congressional directive (see *Peters* v. *Hobby*, 349 U.S. 331; *Gutknecht* v. *United States*, 396 U.S. 295)—which is concededly (Pet. Br. 23) not the case here—or trenches on individual rights entitled to constitutional protection (see *Kent* v. *Dulles*, 357 U.S. 116; *Greene* v. *McElroy*, 360 U.S. 474; *Goldberg* v. *Kelley*, 397 U.S. 254).

The contention that the Executive delegation of appeal authority to State Directors falls into the latter category—on the ground that a I–O classification by the local board can be analogized to a verdict of acquittal in a criminal prosecution (Pet. Br. 24)—is unfounded. Local board proceedings are by nature non-adversary and non-judicial. Congress has recognized this in exempting Selective Service proceed-

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ings from the Administrative Procedure Act (50 U.S.C. App. 463(b)).

The sole function of local boards is to place each registrant within the community available for military service in a particular class (32 C.F.R. 1622.1), largely on the basis of information furnished (in answers to questionnaires and in written supporting statements) by the registrants. This task is performed not by "experts, real or purported, but [by] citizens of the neighborhood" in which the boards operate (*Ex parte Stanziele*, 138 F. 2d 312, 314 (C.A. 3), certiorari denied *sub nom. Stanziele* v. *Paullin, Commanding Officer*, 320 U.S. 797). Local boards do not adjudicate questions of individual responsibility; they do not hold trials to determine anyone's civil or criminal liability; they do not make findings of fact or issue rulings on questions of law. Nor do they indict, punish or impose any legal sanctions. Cf. *Uffelman* v. *United States*, 230 F. 2d 297, 303 (C.A. 9). Rather, their role is to carry out "the sifting and testing process by which individual eligibility, exemption and deferment are determined with [c]ongressional blueprints and enunciated legislative policy" (*United States* v. *Greene*, 220 F. 2d 792, 794 (C.A. 7)."[22]

[22] This is markedly dissimilar from the proceedings before the Loyalty Review Board in *Peters* v. *Hobby*, *supra*, or the Security Clearance Boards involved in *Greene* v. *McElroy*, *supra*. There the function was to review specific accusations against employees relating to their loyalty; the proceedings were adversary or quasi-judicial and the determinations made were "in the nature of adjudications affecting legal rights" (*Hannah* v. *Larche*, *supra*, 363 U.S. at 451). And see *Goldberg* v. *Kelley*, *supra*; cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123.

Thus, the analogy to a verdict of acquittal in a criminal prosecution is misplaced. Moreover, appeals by State Directors from grants of conscientious objector claims do not deprive registrants of any constitutional right. "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from acts of Congress." *Hamilton* v. *Regents*, 293 U.S. 245, 264; and see *Welsh* v. *United States*, 398 U.S. 333, 356 (Mr. Justice Harlan, concurring). And, as expressed above (*supra* pp. 40–41), Congress has provided that the local board's determination that a registrant is entitled to that privilege is subject to appeal within the administrative system. Even if this appeal procedure ultimately results in a loss of conscientious objector status, that cannot be attributed to the State Director, especially where, as here, his sole action has been to file a notice of appeal (see pp. 46–47 *infra*). Rather, it rests with the State Appeal Board, whose duty it is to examine the registrant's file and classify him *de novo* on the basis of "[i]nformation contained in the record received from the local board" (32 C.F.R. 1626.24). See, *e.g.*, *McGee* v. *United States*, No. 362, Oct. Term, 1970, decided May 17, 1971; *McKart* v. *United States*, 395 U.S. 185, 198 n. 16; *United States* v. *Abbott*, 425 F. 2d 910, 913 (C.A. 8); and see pp. 48–49 *infra*.

Accordingly, the President did not exceed his statutory authority in promulgating the regulation (32 C.F.R. 1626.1) affording State Directors a right of appeal from classification decisions by the local board. Cf. *Edwards* v. *Selective Service Local Board No. 111*,

supra, 432 F. 2d at 295." Moreover, the exercise of that regulatory right by the State Director in this case—"based upon the information contained in [petitioner's] selective service file" (A. 84)—was entirely appropriate. Cf. *United States* v. *Cummins*, 425 F. 2d 646 (C.A. 6); *Weiner* v. *Local Board No. 4*, 302 F. Supp. 266 (D. Del.); *Nevarez Bengoechea* v. *Micheli*, 295 F. Supp. 257 (D. P.R.). There is thus no substance to petitioner's belated assertion (*supra* p. 38) that the *de novo* review of his conscientious objector claim by the State Appeal Board was "without statutory basis" within the meaning of *Oestereich* and *Breen*."

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[35] This regulation is not new. It was promulgated in 1951 (E.O. 10292, 16 F.R. 9862) under the 1948 Act, as amended, and has been consistently interpreted by the administrative agency and the courts (see p. 44 *infra*) as authorizing appeals by the State Director from local board classification decisions. Moreover, when Congress reenacted the statute in 1967, changing substantially the appeal procedures with respect to conscientious objector claims (see n. 31 *supra*), it left intact the regulatory authority of the State Director to take appeals to the State Appeal Board. Such a consistent and long-continued interpretation of a statute (*i.e.*, as authorizing the promulgation of the regulatory procedure here in question) by the office or agency charged with the Act's enforcement is entitled to great weight, particularly when Congress has reenacted the statute without repudiating the challenged construction or the alleged authority. See, *e.g.*, *Ehlert* v. *United States*, No. 120, Oct. Term 1970, decided April 21, 1971; *Commissioner* v. *Noel Estate*, 380 U.S. 678, 681–682; *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241–242; *Billings* v. *Truesdell*, 321 U.S. 542, 552–553.

[36] Moreover, the argument is largely academic in the circumstances of this case, since here the National Director took an appeal to the President (whose authority is exercised by the National Appeal Board), who retained petitioner in Class I–A. Such action is explicitly authorized by statute: "The President,

b. Equally untenable is petitioner's contention that he was denied procedural due process because the State Director declined to provide him with a statement of reasons for taking an appeal and he thus could not prepare and submit to the State Appeal Board a meaningful written response in support of his claim.

The Selective Service regulations, 32 C.F.R. 1626.12,[35] prescribe that any person taking an appeal "may attach" to his notice of appeal a statement specifying the grounds on which he bases his request for further administrative review of the local board's classification. If the appeal is taken by the National Director or by a State Director, and he elects to ex-

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upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [including section 456(j)], and the determination of the President shall be final" (50 U.S.C. App. 460(b)(3)). Thus, the change in petitioner's classification from I-O to I-A by the National Appeal Board, which classifies *de novo* (see *Bowles* v *United States*, 319 U.S. 33; *Clay* v. *United States*, 397 F. 2d 901, 913 (C.A. 5), reversed on other grounds, No. 783, Oct. Term, 1970, June 27, 1971), was plainly authorized by statute and—in the absence of possible reliance by the State Appeal Board on a clearly erroneous legal standard (see p. 51 *infra*), which is concededly not the case here—suffers from no alleged infirmities that might have existed at an earlier level in the administrative review process.

[35] The regulation provides: "The person appealing may attach to his appeal a statement specifying the matters in which he believes the board erred, may direct attention to any information in the registrant's file which he believes the local board has failed to consider or to give sufficient weight, and may set out in full any information which was offered to the local board and which the local board failed or refused to include in the registrant's file."

ercise this privilege, it is generally recognized that procedural due process requires that he furnish a copy of his statement to the registrant and the registrant be given an opportunity to respond in writing. See, *e.g.*, *United States* v. *Cummins*, *supra*; *Weiner* v. *Local Board No. 4*, *supra*; *Nevarez Bengeochea* v. *Micheli*, *supra*; and cf. *United States* v. *Thompson*, 431 F. 2d 1265, 1271 (C.A. 3); *Murray* v. *Blatchford*, 307 F. Supp. 1038, 1054–1055 (D. R.I.); and cf. *Gonzales* v. *United States*, 348 U.S. 407; *Simmons* v. *United States*, 348 U.S. 397; *United States* v. *Nugent*, 346 U.S. 1; *United States* v. *Cabbage*, 430 F. 2d 1037, 1039–1041 (C.A. 6); *United States* v. *Owen*, 415 F. 2d 383, 388–389 (C.A. 8).

That principle is inapplicable to the present case, however, where the State Director, as was his prerogative (32 C.F.R. 1626.12), attached no statement of reasons to his appeal notice and furnished no additional information to the State Appeal Board. Petitioner's contrary assertion—*i.e.*, "the State Director's appeal was accompanied by either an oral or written statement to the Appeal Board specifying allegedly adverse evidence, or at least directing the Board's attention to what he considered to be the defects in the Local Board's determination" (Pet. Br. 10 n. 5)—has no support in the record [**] and rests on conjecture derived from "the practice of [other] State Directors * * * to submit such statements to the Appeal

[**] Petitioner's entire Selective Service file was made available to him for examination and xeroxing, at his request, after it had been returned to the local board following the decision of the National Appeal Board to retain him in Class I-A.

Boards" (*ibid.*). But, as indicated, the pertinent regulation is not mandatory; it states simply that the person taking an appeal "may attach" supplementary information." Whatever might be the practice of other State Directors, this case involves only the actions of this State Director with respect to petitioner.

In these circumstances, petitioner was not entitled to submit an additional written statement that had not been considered by the local board. As this Court pointed out in *Gonzales, supra*, 348 U.S. at 414–415, the right to file a statement of reasons with the State Appeal Board belongs to the person taking the appeal (see 32 C.F.R. 1626.12). While a registrant is entitled to review and respond to any new information added by others to his file subsequent to the local

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[37] This permissive language should be contrasted with the directive in 32 C.F.R. 1627.1(c) that the State Director taking an appeal to the National Appeal Board "shall place in such file a written statement of his reasons for taking such appeal." This requirement is due to the fact that the appeal by a State Director to the President, unlike his appeal to the State Appeal Board, is confined to situations which he "deems * * * to be in the national interest or necessary to avoid an injustice" (32 C.F.R. 1627.1); he is, therefore, required to express in writing why he believes his appeal is of such nature. We add parenthetically, that the appeal to the President in the instant case was not taken by the State Director, but by the National Director on petitioner's behalf (see pp. 8–9 *supra*). 32 C.F.R. 1627.1(b). A comprehensive statement (A. 69–72) of his reasons for seeking further administrative review was provided by petitioner for consideration by the National Appeal Board. This procedure was entirely consistent with the pertinent regulatory requirements and has not been challenged by petitioner at any time in these proceedings. Rather, petitioner's attack is confined to the actions of the State Director and of the State Appeal Board.

board's classification, due process does not require that he otherwise be permitted to bolster his claim. Nor have we been able to find a single case suggesting otherwise.

The reason is manifest. As pointed out by the dissent below (A. 116), "since the Appeal Board hears and decides each case *de novo*, if the appellant-Director does not choose to frame the issues, the registrant is not at any disadvantage." Under the regulations, appeal boards are instructed to "classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant." 32 C.F.R. 1626.26(a). It is "universally held that the [appeal board's] * * * classification is one of first instance, not a mere affirmance or reversal of the Local Board * * *" (*DeRemer* v. *United States*, 340 F. 2d 712, 719 (C.A. 8)). And see *McKart* v. *United States*, *supra*, 395 U.S. at 198 n. 16. The scope of its review, however, is explicitly limited as follows (32 C.F.R. 1626.24(b)):

> In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:
>
> (1) Information contained in the record received from the local board.
>
> (2) General information concerning economic, industrial, and social conditions.

The State Appeal Board followed these restrictions in the instant case.[18] Moreover the record shows that in doing so it did not ignore any material properly to be considered in evaluating petitioner's conscientious objector claim. Not only did his file contain the completed Form 150 (see pp. 5–6 *supra*) and supporting letters from personal references,[19] but, in addition, petitioner had himself filed a lengthy statement with the local board responsive to certain questions that he had been asked during his personal appearance (see Appendix A, pp. 63–66 *infra*), and an attorney had added a separate letter to petitioner's file arguing his case on legal grounds (see Appendix B, pp. 67–71 *infra*).

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[18] Petitioner seeks to equate the "brief" synopsis that was attached to his file by an employee of the State Appeal Board with the FBI reports or the Justice Department recommendation that were involved in *Gonzales* and *Simmons* (Pet. Br. 16 n. 9). The clerical "summary of the registrant's Selective Service file" (A. 89(i)), however, is of a different character; it did not contain independent evidence or additional information relating to petitioner's claim, as did the other documents. Moreover, to the extent that it had any influence on the State Appeal Board's decision, that is a matter that relates directly to the board's exercise of judgment and discretion in evaluating the evidence before it and is thus reserved by Section 10(b)(3) for post-induction judicial review.

[19] The State Appeal Board's refusal to consider subsequently filed supporting letters by the same references was not only procedurally proper (32 C.F.R. 1626.24(b)); it also did not place petitioner at any disadvantage. The subsequent letters were largely repetitive of the views expressed in the letters that were already in petitioner's file (compare C.A. App. 74a, 76a–77a, 79a with A. 48, 49–50, 51–52). Moreover, these subsequent letters, together with a letter written by petitioner in support of the appeal to the National Appeal Board taken on his behalf (A. 69–72), were included in his Selective Service file at the time it was considered by the National Appeal Board.

Both petitioner and the dissenting opinion below (A. 118 n. 10) speculate that the State Appeal Board did in fact base its determination on "[g]eneral information" outside the record before the local board "concerning economic, industrial, and social conditions" (32 C.F.R. 1626.24(b)). If that were the fact, the effect of that action is an issue which must be resolved under the "basis in fact" standard of review for testing the correctness of the classification determination, and only "after the registrant has responded either affirmatively or negatively to an order to report for induction" (50 U.S.C. App. (Supp. V) 460(b)(3)). See *Clark* v. *Gabriel, supra.* It calls for precisely the type of evaluation of administrative judgment and discretion that is barred by Section 10 (b)(3) from preinduction judicial review under the *Oestereich-Breen* construction of the statute.

c. Finally, petitioner contends that the failure of the State Appeal Board to set forth in writing its reasons for assigning him a I-A classification is inconsistent with procedural due process requirements of fundamental fairness.

There is no requirement in the statute or regulations (see 32 C.F.R. 1623.4, 1625.11, 1626.26, and 1627.6) that the various administrative boards of the Selective Service System must accompany their classification decisions with a statement of reasons.[*] More-

[*] The draft bill that is presently pending before the Conference Committee (H.R. 6531, 92d Cong., 1st Sess.) amends the Act by adding subsection 23(b)(4), which provides: "In the event of a decision adverse to the claim of a registrant, the local board or appeal board making such decision shall, upon request, furnish to such registrant a brief written statement of the reasons for its decision."

over, Congress has explicitly excused the agency from such a requirement under the Administrative Procedure Act[41] (50 U.S.C. App. 463(b)). And, it has long been the settled practice of these boards of volunteer laymen to assign registrants a particular classification without explanation. See, *e.g.*, *Witmer* v. *United States*, *supra*; *Dickinson* v. *United States*, 346 U.S. 389.

Where, however, following the local board's classification, there is included in the registrant's file a government recommendation which contains improper legal grounds for denying a conscientious objector claim, this Court has consistently held that a failure of the Appeal Board to state reasons for its denial "must vitiate the entire proceedings" (*Sicurella* v. *United States*, 348 U.S. 385, 392). This is so notwithstanding the fact that there existed proper grounds on which the denial could have rested. See, *e.g.*, *Clay* v. *United States*, No. 783, Oct. Term, 1970, reversed June 28, 1971; *United States* v. *Jackobson*, 325 F. 2d 409, 416–417 (C.A. 2), affirmed *sub nom. United States* v. *Seeger*, 380 U.S. 163; and cf. *United States* v. *Atherton*, 430 F. 2d 741, 746 (C.A. 9). But the present case does not involve that situation.[42]

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[41] That statute provides (5 U.S.C. (Supp. V) 555(e)): "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

[42] Here, no statement of reasons was submitted by the local board (compare *United States* v. *Atherton*, *supra*), and no statement or recommendation was submitted by the government

Petitioner's argument rests on a relatively recent line of authority—all post-induction cases, beginning essentially with *United States* v. *Haughton*, 413 F. 2d 736 (C.A. 9)—holding that the failure of local or appeal boards to give reasons for their denials of conscientious objector claims is fatal where it can be shown, on the basis of the information in the Selective Service file, that the registrant made out a *prima facie* case for exemption. See, *e.g.*, *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (C.A. 3); *United States* v. *Stetter*, C.A. 5, No. 30036, decided June 14, 1971, and the cases collected therein at slip op. p. 24 nn. 6–12. This principle seems "to be based on the salutary desire to supply the district court with a proper record of the administrative proceedings in their review of whether the registrant has met the statutory criteria." *Scott* v. *Commanding Officer*, *supra*, 431 F. 2d at 1138 (Aldisert, J., concurring). As the Ninth Circuit declared in *Haughton*, *supra*, 413 F. 2d at 739:

> * * * Inconsistent statements or actions or a finding of insincerity may support the denial of conscientious status. * * * The local board, however, must state its reasons for the denial of a requested classification when a registrant has

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(compare *Clay* v. *United States*, *supra*). Indeed, the only *legal* discussion concerning the claim was in the attorney's letter written on petitioner's behalf (see Appendix B, pp. 67–71 *infra*). We do not understand petitioner to be arguing, however, that that letter set forth an erroneous legal standard which, because it was before the State Appeal Board, "must vitiate the entire proceedings" (*Sicurella* v. *United States*, *supra*, 348 U.S. at 392).

> "met the statutory criteria" * * * for that classification or * * * has placed himself "prima facie within the statutory exemption." * * * Otherwise a court cannot determine whether a board's denial of a requested classification was based on a belief that the registrant's statements, even if true, did not entitle him to the classification, or on the reasonable disbelief of certain allegations necessary to the registrant's *prima facie* case. * * *

Accord: *United States* v. *Broyles, supra*, 423 F. 2d at 1303–1304; *Paszel* v. *Laird*, 426 F. 2d 1169, 1175 (C.A. 2); *United States* v. *Lemmens*, 430 F. 2d 619, 623 (C.A. 7); *Scott* v. *Commanding Officer, supra*, 431 F. 2d at 1137; *United States* v. *Crownfield*, 3 S.S.L.R. 3833, 3834–3835 (C.A. 3).

Whatever the propriety of applying that principle to post-induction review, the lack of a statement by the Appeal Board of its reasons for denying a conscientious objector claim that the local board allowed does not justify an exception to the bar of Section 10(b)(3) against pre-induction review of the classifying or processing of registrants. The *Haughton* rule applies only if the registrant has shown that he was *prima facie* entitled to an exemption or deferment. See, *e.g.*, *United States* v. *Findley*, 3 S.S.L.R. 3836 (C.A. 1). That determination calls for precisely the type of judicial appraisal of board action "inescapably involv[ing] a determination of fact and an exercise of judgment" (*Clark* v. *Gabriel, supra*, 393 U.S. at 258) that this Court has held to be impermissible prior to in-

duction (see pp. 21–22 *supra*).[43] To permit preinduction review of the "quantum of evidence" in a registrant's selective service file (*Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7) for purposes of determining whether the appeal board should have explained its action in writing, is, we submit, no more appropriate here than where the preinduction challenge is to a refusal of the local board to reopen on submission of an allegedly *prima facie* claim. See, *e.g.*, *Lane* v. *Local Board No. 17, supra; Ferrell* v. *Selective Service Board, supra; Morgan* v. *Melchar, supra; Blatt* v. *Local Board No. 116, supra; Bookout* v. *Thomas, supra.*

Moreover, it bears repeating that *Oestereich* and *Breen* establish a construction of Section 10(b)(3) that permits preinduction review only where "it [is] plain on the record and on the face of the Act that an exemption had been granted * * *" (*Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 238 n. 7); a mere showing of *prima facie* entitlement to a possible exemption is inadequate.[44]

To recapitulate: Petitioner's claims are not yet ripe for adjudication; his right under the statute to con-

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[43] In Selective Service cases, a *prima facie* case is present "if a registrant has presented facts which, if true and uncontradicted by other information contained in his file, would be sufficient under the regulations [or statute] to warrant granting his requested classification." *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D.N.Y.). And see *Mulloy* v. *United States, supra,* 398 U.S. at 416.

[44] Here, petitioner's claim that he was *prima facie* entitled to conscientious objector status is disputed. To be sure, the

scientious objector status is contested; the actions taken by the State Director and the State Appeal Board were not without statutory basis and complied fully with the regulations; and the challenged procedures all involve an exercise of administrative judgment and discretion which is directly related to the merits of petitioner's claim. Any one of these factors might alone be sufficient to bar preinduction review. In combination, they present precisely the type of challenge to "the classification or processing" by Selective Service that Congress determined in Section 10(b)(3) should await judicial review until "after the registrant has responded either affirmatively or negatively to an order to report for induction." 50 U.S.C. App. (Supp. V) 460(b)(3). Under this Court's construction of that provision in *Oestereich, Gabriel,*

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local board awarded him a I-O classification after a review of his file and two personal appearances. But the State Appeal Board, whose "classification must rest solely upon objective facts within the selective service file" (*United States* v. *Abbott*, 425 F. 2d 910, 913 (C.A. 8); and see *Witmer* v. *United States*, 348 U.S. 375, 382), reached the opposite conclusion. Whether there is information in petitioner's Selective Service file—that might have been overlooked or ignored by the local board—which on its face discredits the nature of petitioner's belief concerning war (see *Gillette* v. *United States*, 401 U.S. 437), or the "religious" basis of the objection (*Welsh* v. *United States*, 398 U.S. 333), or petitioner's sincerity (*Witmer* v. *United States*, *supra*), is something that cannot—and should not—be determined in the present preinduction suit. That is an issue which—if petitioner is ever ordered to report for induction—can properly be reviewed when the entire Selective Service file is before the courts, either in a habeas corpus action after induction, if he so chooses, or in defense to a criminal prosecution for refusal of induction, if he should elect that course.

Breen and *Boyd*, that congressional judgment bars preinduction judicial review in this case."

III. AT ALL EVENTS PETITIONER SHOULD BE REQUIRED TO DEMONSTRATE THAT THE MONETARY AMOUNT IN CONTROVERSY SATISFIES THE $10,000 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. 1331

Even if this Court, however, should hold that petitioner's claims are justiciable and warrant preinduction judicial review, we think that petitioner also should be required to establish that the amount in controversy exceeds the $10,000 jurisdictional requirement of 28 U.S.C. 1331.

In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs" (28 U.S.C. 1331, 1332). The Administrative Procedure Act does not provide a basis for federal

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"The "litigious interruption" in processing petitioner has already exceeded two and one half years. Even if he were ultimately to prevail in the instant suit, it cannot be determined on this record whether he is entitled to an exemption from military service. Thus, unlike *Oestereich* and *Breen*, where this Court could conclude with legal certainty that the administrative processing was at an end—petitioner would still be subject to further administrative action. Petitioner himself concedes the point; the relief he now seeks is the chance to supplement the information in his selective service file, "to present his side of the case to the Appeal Board and to make a complete appellate record in support of his conscientious objector status before submitting his claim to a court for final determination" (Pet. Br. 32–33). It is such interference with the administration of the System that Congress has prohibited.

jurisdiction over such suits; Congress has explicitly provided in the Military Selective Service Act that "[a]ll functions performed under this title * * * shall be excluded from the operation of the Administrative Procedure Act * * * [except as to section 3 of the APA, pertaining to publication of agency regulations]" (50 U.S.C. App. (Supp. V) 463(b)).[46] Nor is there any provision in the Military Selective Service Act itself that can be construed as an affirmative grant of federal jurisdiction.[47]

In *Oestereich, supra,* this Court expressly recognized the applicability of the amount-in-controversy requirement in preinduction Selective Service cases. There, after finding that the suit was not barred by Section 10(b)(3), it remanded the case to afford the registrant an opportunity "to demonstrate that he meets the jurisdictional requirements of 28 U.S.C. § 1331." 393 U.S. at 239. See also *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 826; *Goldsmith* v. *Sutherland,* 426 F. 2d 1395 (C.A. 6), certiorari denied, 400 U.S. 960; *Boyd* v. *Clark, supra,* 287 F. Supp. at 564.

Petitioner seeks to avoid the thrust of this ruling on the ground that he is asserting constitutionally

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[46] Where the Administrative Procedure Act applies, review is available under Section 10 of that statute: 5 U.S.C. (Supp. V) 701–706.

[47] Most regulatory statutes explicitly confer jurisdiction. See generally *Developments in the Law—Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 903–904 (1957). Such was the case in *Aptheker* v. *Secretary of State,* 378 U.S. 500 (see 50 U.S.C. 793) and *Schneider* v. *Rusk,* 377 U.S. 163 (see 8 U.S.C. 1105a), cited by petitioner and *amicus.*

guaranteed rights on which "a monetary price cannot be placed * * * because they are of infinite value and concern and do not conform to the property notion of valuation in monetary amount" (Pet. Br. 38). But Congress has conditioned access to the federal courts on a litigant's ability to establish that his dispute involves a minimum monetary amount "*and* arises under the Constitution * * *" (28 U.S.C. 1331; emphasis added). This has long been interpreted to require that the controversy be capable of valuation in pecuniary terms. See, *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496, 529–530;[46] *Yoder* v. *Tribes of Fort Peck Indian Reservation*, 339 F. 2d 360 (C.A. 9).

While the plaintiff need not show an economic loss with absolute certainty (see *e.g. St. Paul Mercury Indemnity Co.* v. *Red Cab Company*, 303 U.S. 283, 289; *Berk* v. *Laird*, 429 F. 2d 302 (C.A. 2); *Parker* v. *Erie-Lackawanna System*, 393 F. 2d 229 (C.A. 7)),[47]

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[46] In *Hague*, involving an injunctive suit against city officials to protect First Amendment rights, a majority of the Court (although disagreeing on a subsidiary point) sustained jurisdiction under 28 U.S.C. 1343(3), on the explicit or implicit premise that jurisdiction did not lie under 28 U.S.C. 1331 (see 307 U.S. at 507–508 (opinion of Roberts, J.), 519, 527–532 (opinion of Stone, J.), 532 (opinion of Hughes, C.J.)). The dissenting justices indicated no contrary view (see 307 U.S. at 532–533).

[47] It has been suggested that, where purely injunctive relief is sought, the amount in controversy may be measured by either "the value of the relief sought to be gained by plaintiff * * * [or] the cost [of enforcing that right] to the defendant." *Hedberg* v. *State Farm Mutual Automobile Ins. Co.*, 350 F. 2d 924, 928 (C.A. 8) (dictum); and see *Hatridge* v. *Aetna Casualty & Surety Co.*, 415 F. 2d 809, 814–816 (C.A. 8).

actions asserting rights not capable of monetary valuation do not satisfy the requirement of jurisdictional statutes prescribing that the matter in controversy exceed a specified dollar sum. See, *e.g.*, *Barry* v. *Mercein*, 5 How. 103 (right of custody of a child); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (bank's suit to enjoin administrative subpoena which would "unlawfully expose its business affairs" and "lessen public confidence"); *Kurtz* v. *Moffitt*, 115 U.S. 487 (writ of habeas corpus); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (C.A. 2) (inquisition of lunacy); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7), certiorari denied, 379 U.S. 1001 (action to enjoin FBI agents from conducting close surveillance of plaintiff); and cf. *Carroll* v. *Somerveil*, 116 F. 2d 918 (C.A. 2); *Ackerman* v. *Columbia Broadcasting System, Inc.*, 301 F. Supp. 628 (S.D. N.Y.).[50]

The congressional purpose behind Section 1331 might have been simply to keep "petty" cases out of federal courts, as petitioner suggests (Pet. Br. 35–36). And this case may be viewed as involving a "substantial" enough claim to warrant the attention of the federal judiciary (see S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 3–4). Nevertheless, to achieve its purpose Congress adopted a monetary standard, which the courts are not free to ignore in a particular situation where it operates to bar civil cases that otherwise

[50] But see *Cortright* v. *Resor*, 3 S.S.I.L.R. 3799, 3804 (E.D. N.Y.), appeal pending, C.A. 2, No. 71–1365; *Moylan* v. *Laird*, 305 F. Supp. 551, 553 (D. R.I.); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1276 (S.D.N.Y.); *Murray* v. *Vaughn*, 300 F. Supp. 688 (D. R.I.); *Faulkner* v. *Clifford*, 289 F. Supp. 895, 899–901 (E.D.N.Y.).

bring into question significant federal rights. In various Civil Rights Acts and in other statutes Congress has conferred federal jurisdiction without regard to the amount in controversy. *E.g.*, 28 U.S.C. 1343, 1344, 1337, 1338, 1339, 1340, 1346; 46 U.S.C. 688 (Jones Act); 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act). That Congress has not done so for cases like this one may well result in an "unfortunate gap in the statutory jurisdiction of federal courts." *Wolff* v. *Selective Service Local Board No. 16, supra,* 372 F. 2d at 826.[51] But that seems to be the effect of the plain language of Section 1331.

It is contended, however, that the jurisdictional amount limitation is unconstitutional as applied to any case challenging the action of a federal official, at least where a constitutional claim is asserted. But, since petitioner argues that he "can sustain his jurisdictional allegation" (Pet. Br. 39), and the question has not yet been resolved by the courts below (see A. 111), there is no occasion for this Court now to decide whether, if he should fail to establish the requisite amount in controversy, an application of Section 1331 in such circumstances to bar preinduction judicial review would be constitutional. See *Oestereich* v. *Selective Service Board, supra,* 393 U.S. at 239.

Accordingly, even if petitioner should prevail on the other issues in this case, we think it appropriate for

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[51] And see ALI, *Study of the Division Between State and Federal Courts* 172 (1969); C. Wright, *Federal Courts*, § 32 at 110 (1969); Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. Chi. L. Rev. 268, 296 (1969).

this Court to remand to give him an opportunity to prove his allegation that more than $10,000 is in controversy here.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed. Should this Court reverse the judgment below, the cause should be remanded to the district court with directions to hold a hearing on the merits of the complaint, including the question of the jurisdictional amount required by 28 U.S.C. 1331.

Respectfully submitted.

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JULY 1971.

APPENDIX A

Statement to Local Board No. 7
May 22, 1968

I would like to review several points which you raised at our first meeting on November 15, 1967. When we talked at that time, you wanted to be certain that I understood the consequence of being a conscientious objector, namely, the necessity of doing alternative civilian service. I indicated to you my willingness to do civilian service, particularly in the poverty concentrated areas of our country. I indicated that I felt an obligation to serve my country, but that my conscience would not permit me to do so in the military. My Form 150 pointed out that I presently live and work in the poor community in Cleveland; that the health needs of poor people in this country press deeply on my conscience. For these unmet health needs represent to me an unintentional genocide which becomes more intentional as additional facts are uncovered exposing the inadequate health care received by the poor. However, since that first meeting with you, an additional consequence of my conscientious objector's position has become apparent to me. That is, the possibility that my conscience and beliefs may lead me to be jailed up to five years and may make it impossible for me to obtain a medical license to practice in any state in our country. At this juncture, I am willing to take this consequence, if this local board says that I must. I cannot and I will not violate the dictates of my conscience.

Many of the questions you raised at our first meeting centered about the nature of my religious training and belief. Was I a member of a "peace church", such as the Quakers? What doctrinal basis for my beliefs are there in the Lutheran Church? Was my belief "a merely personal moral code"? Let us take these questions individually. First, as I stated during our November meeting, I am not a Quaker, although I have been influenced by Quaker philosophy and tradition. However, membership in a "peace church" is not a requisite for consideration as a conscientious objector, as I learned through study and discussion with Mr. Ralph Rudd, an attorney. I wish to quote from a letter by him to you, in which Mr. Rudd cites the case of the *US vs. Seeger:*

> "In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on 'religious training and belief'."

Second, you mentioned in our November meeting that you had not known of any Lutherans who took a conscientious objectors position, neither were you aware of any doctrine in the Lutheran Church that opposed war. Since our meeting, I have become familiar with a group called the Lutheran Peace Fellowship, which is an organization of Lutherans who hold a conscientious objectors status. Thus, others who have received their religious training within the Lutheran Church have been led by their religious training and belief to the same position I have, and other local boards have recognized this position. I have also talked with the Rev. Raymond Miklethun, Lutheran Campus pastor at Case-Western Reserve University about my conscientious objection. Let me read from the letter he has written to you:

> "Men who have come out of a Lutheran training have been taught that there are limits on participation in war for every Christian. This statement from the Augsberg Confession, Article XVI is typical. 'Our churches teach that lawful civil ordinances are good works of God, and that it is right for Christians to engage in just wars . . . But when commands of civil authority cannot be obeyed without sin, we must obey God rather than man.'"

Third, since I presently lack membership in the Lutheran Church, you raised the question, is my objection based on "a merely personal moral code"? It is certainly true, that my beliefs do constitute a personal moral code, for what value is any religious belief if it is not held to be relevant and binding to the individual? But it is not merely a personal moral code, as I pointed out in my Form 150, since my beliefs "are ideals which emanate from centuries of religious tradition". That there is a position between membership in an organized church and a merely personal moral code was established in the *US vs. Seeger* case, in which it was said:

> "The Congress recognized that one might be religious without belonging to an organized church just as surely as minority members of a faith not opposed to war might through religious reading reach a conviction against participation in war."

The court goes on to say, that "individual belief" establishes the eligibility for conscientious objection and that the test of belief "is whether a given belief . . . occupies a place in the life of its possesser parallel to that filled by the orthodox belief in God . . ."

In conclusion, I maintain that my religious training has nurtured within me a set of beliefs about the quality of "goodness" in all men, which imposes certain duties on my conduct. Thus my beliefs have directed my life: where I live, with whom I work, the type of work that I do. It is this set of beliefs that lead me to be conscientiously opposed to war, and willing to accept the consequences, alternative service or jail.

OLIVER FEIN.

APPENDIX B

Selective Service Local Board No. 7
45 South Broadway
May 21, 1968

Re: Oliver Thomas Fein,
Selective Service No. 30–7–40–172.

GENTLEMEN, I'm writing on behalf of the above named registrant to try to clarify what seems, by his report, to be a confusion with respect to the law governing eligibility for classification as a conscientious objector.

Dr. Fein advises me that in an informal conference with the Local Board on November 15, 1967 the Board expressed doubts as to his eligibility for classification as a conscientious objector, the doubt arising from the fact that although he was brought up in the Lutheran church he does not say that he is a Lutheran now and cannot say that conscientious objection is required of its members as a part of the doctrine of the Lutheran church.

If Dr. Fein and I understand correctly what your view of the law is, I am compelled to say on his behalf that your view seems to be mistaken.

As you know, the present statute with respect to conscientious objection is substantially identical with the Act of 1940. Shortly after the 1940 Act, two cases were decided by the United States Court of Appeals for the 2nd Circuit, the very Circuit in which your Board is located, that made it very clear that a registrant does not need to be a member of any established church or to follow the beliefs of any such church in order to be eligible for classification as a conscientious

objector, since the law looks to the registrant's own individual beliefs. These cases were *U.S.* v. *Kauten,* 133 F.2d 703, 1943 and *U.S.* v. *Downer,* 135 F.2d 521, also decided in 1943.

In the *Downer* case the court referred to the fact that the 1917 Draft Law had required membership in a well recognized religious sect or organization whose existing creed or principles forbidded its members to participate in war in any form. The court pointed out that the 1940 Bill had originally contained the same provision but before enactment was amended to its present form in order to secure greater protection for individual beliefs. Membership in an established church or the following of its beliefs was not intended as a requisite, a view which was repeated on the floor of Congress, the court said. The court then referred to the *Kauten* case as follows:

> "Hence we said in the Kauten case, 133 F.2d at page 708: 'The provisions of the present statute are more generous, for they take into account the characteristics of skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed the basis of exemption.' "

In *White* v. *United States,* 215 F.2d 782, 9 Cir., 1954 the court summarized the law as follows in its footnote number 2:

> "It is noted that the exemption authorized by section 6(j) of the Act, 50 USCA appendix, section 456(j) is based upon the religious belief of the particular individual, not upon the religious tenets of an organization of which he is a member. The reference is to 'an individual's belief.' See *Gonzales* v. *U.S.,* 6 Cir., 212 F.2d 71, 72: '* * * members of the sect are not necessarily, by virtue of their membership, conscientious

> objectors, but each determines, according to his own conscience and according to his interpretation of the Bible, whether he may conscientiously engage in military service. 'In *United States* v. *Simmons,* 7 Cir., 213 F.2d 901, 904, it is said: 'Affiliation with a particular religious sect does not per se entitle a registrant to conscientious objector status. The duty imposed on the boards is to determine subjectively and objectively the sincerity of the individual's belief, not the nature of the teachings of any religious faith.'"

The case of *In Re Hansen,* 148 F.Supp. 187, USDC Minn., 1957, was an immigration case. The applicant was a conscientious objector and asked to take the naturalization oath promising to perform work of national importance under civilian direction when required by law instead of to bear arms. The examiner had held that the immigration statute, 8 USCA Section 1448(a) required that the conscientious objection be based upon religious training and belief and that the applicant had shown that while he had been brought up a Lutheran and was still a devout Lutheran, the doctrines of his church and his religious training in it did not oppose war. The court overruled the examiner's view and said that Hansen was entitled to naturalization. The court reasoned that the term "religious training and belief" as used in the statute is one concept not two and was defined, just as it was in the draft law, as "an individual's *belief* in relation to a Supreme Being involving duties superior to those arising out of any human relation, . . ." Quoting Judge Aldrich in the case of *In Re Nissen,* 138 F. Supp. 483, the court indicated that the training referred to in the statute is a mere background against

which the person's sincerity could be tested. Then the court made the following statement:

> "It seems to me that to ascribe any more meaning to 'training' than it already contained in the statutory definition would be to permit only those who are members of religious sects which are doctrinally opposed to war to claim the exemption from the full oath required by the statute. It is quite clear that when Congress employed the term 'religious training and belief' it did not contemplate only members of those religious groups. *U.S.* v. *Kauten*, 2 Cir., 133 F.2d 703, 708; *U.S. ex. rel. Phillips v. Downer*, 2 Cir., 135 F.2d 521, 524. If such were the case, I would find myself in the untenable position of denying citizenship *because* the petitioner is a Lutheran despite the fact that his beliefs opposing war may well be as devout as those of the Jehovah's Witnesses or the Mennonites. See *U.S. v. Evengram*, D.C.S.D.W.Va., 102 F.Supp. 128."

Let me call your attention next to the celebrated case of *United States v. Seeger*, 380 U.S. 163, 13 L.ed.2d 733, 85 Sup.Ct. 850, 1966, a United States Supreme Court decision that also arose in the 2nd Circuit. In the first place the court expressly said; at 380 U.S. 171:

> "In adopting the 1940 Selective Training and Service Act Congress broadened the exemption afforded in the 1917 Act by making it unnecessary to belong to a pacifist religious sect if the claimant's own opposition to war was based on 'religious training and belief'."

In the second place, the entire discussion by the Supreme Court in the *Seeger* case makes it clear that the eligibility of a registrant for classification as a conscientious objector depends entirely upon his own individual beliefs, not upon membership in any organized religious body nor adherence to its doctrines.

The problem in the *Seeger* case was what kind of individual belief would satisfy the test of being religious. The court concluded, 380 U.S. at 176:

> "Under the 1940 Act it was necessary only to have a conviction based upon religious training and belief; we believe that is all that is required here. Within that phrase would come all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent. The test might be stated in these words: a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well established Congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."

I believe no further citation or quotation of the law is needed. It seems to be completely clear that Dr. Fein's lack of membership in the Lutheran church at present, although he was brought up in it and traces his fundamental Christian training to that experience, is not a controlling factor at present. What controls his eligibility for the conscientious objector's classification is that he is at present on the *basis* of his religious training and belief conscientiously opposed to participation in war in any form. I think he had made it very clear that this is the fact and that he is enormously sincere in his expression of this belief. The law quite clearly requires him to be classified as a conscientious objector, as he requests.

Sincerely yours,

RALPH RUDD.

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